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IN THE
COURT OF APPEALS OF INDIANA

BRUCE ROBERTS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0405-CR-258
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Master Commissioner
Cause No. 49G05-0304-FB-68434

April 12, 2005

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Bruce Roberts appeals his conviction, after a jury trial, of reckless homicide, a class C felony, and the order that he pay a public defender services fee.

We affirm.

ISSUES

1. Whether sufficient evidence supports the conviction.

2. Whether the trial court abused its discretion when it ordered Roberts to pay a $100.00 public defender services fee.

FACTS

Saturday, April 26, 2003, was a warm, sunny day. In the early afternoon, Rosa Payton, Roberts' fiancée, wanted to retrieve her vehicle from a friend's house. She borrowed her father's 1994 Chevrolet Blazer, and Roberts drove it. Payton testified that the Blazer had "extremely bad" alignment, causing it to "veer[] to the right." (Tr. 50). Roberts drove westbound on Washington Street toward Emerson Avenue. The area is primarily residential, with some small businesses, and with sidewalks alongside the curbside of Washington Street. The posted speed limit is thirty-five miles per hour. Roberts' vehicle was in the right lane and traveling in excess of forty-five miles per hour.

Seventy-two year-old Maude Bryant had bought a meal at Church's Chicken on the south side of Washington Street, and she had crossed the street to wait for a bus on the north side. As Bryant stood at the bus stop next to a utility pole six inches from the roadway, Roberts' vehicle sped toward her. Approximately sixty feet to the east of Bryant, Robert's vehicle swerved right. It struck the curb, traveled into the grassy area

and then – as it moved back toward the roadway – struck Bryant. After striking Bryant, the vehicle struck the utility pole, splitting it, and then rotated into the roadway and flipped over four times. Bryant was killed on impact; her body was thrown nearly thirty feet away.

Roberts and Payton were taken to the hospital. Sergeant Roger Tuchek, who had extensive training as a drug recognition expert, interviewed Roberts at the hospital and concluded that "based on the signs and symptoms that Mr. Roberts was impaired on some type of narcotic analgesic." (Tr. 149). Roberts agreed to a blood test, which was administered.

On April 28, 2003, the State charged Roberts with reckless homicide, a class C felony; operating a motor vehicle while intoxicated causing death, a class C felony; operating a motor vehicle while intoxicated causing serious bodily injury,[1] a class D felony; and operating a motor vehicle while an habitual traffic violator. The first three counts were tried to a jury on March 15 and 16, 2004.

At trial, Thomas Asher testified that he was walking eastbound on the sidewalk when he observed Bryant "standing there, waiting for the bus." (Tr. 102). Asher testified that Roberts' vehicle, traveling at a speed "between fifty-five and sixty," "was heading straight and then it kind of swerved" off the roadway. (Tr. 104, 103). The vehicle "came on the sidewalk and then hit the pole and the lady, flipped four times after that." (Tr. 103). Dr. John Pless, a forensic pathologist, testified that Bryant was killed by massive

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[1] This count alleged serious bodily injury to Payton, namely "a fractured pelvis and/or a fractured wrist and/or an internal injury to the spleen." (App. 30).

blunt force injury and that in his opinion, "the force required to produce these injuries would have to be made by a vehicle traveling . . . in excess of forty-five miles an hour." (Tr. 179). Sergeant Doug Heustis, a Marion County Sheriff's Department deputy trained in crash investigation and reconstruction, testified that based upon measurements taken at the scene that day, he believed Roberts' vehicle "was going at least fifty, fifty-five miles an hour" after it struck the pole "and that prior to striking the pole he was going a little faster than that." (Tr. 224).[2] According to Heustis, the vehicle's speed "would have made it more difficult for [Roberts] to control the car." Id.

Heustis also testified that there was no evidence of braking by Roberts at the crash scene. When asked what he had determined about the Blazer's possible bad alignment, Heustis testified that when he "visually inspect[ed] the tires," he observed "nothing abnormal" as to the tread, and that there would likely be visible evidence on the tires in the case of "a consistent or a severe alignment problem." (Tr. 231, 234). Numerous pictures of the crash scene were admitted into evidence, as was a large diagram of the scene prepared by Heustis.

A toxicology report dated October 20, 2003 showing the results of the test of Roberts' blood was admitted. According to Peter Method, Ph.D., of the Indiana Department of Toxicology, the sample taken from Roberts indicated (1) the presence of a low level of a metabolite (waste product) of cocaine, and (2) methadone. A counselor from Indianapolis Treatment Center testified that Roberts had been treated with

[2] Heustis had earlier testified that the vehicle "lost a little speed just from striking the pole." (Tr. 221).

methadone since November of 2002, but that several days before the crash, he had failed to regularly attend the Center for receipt of his methadone doses. Specifically, Roberts had been absent from April 16th through April 21st (6 days), then received a dose on April 22nd and one on April 23rd, was absent April 24th, and received a dose on April 25th. According to Dr. Method, if a methadone user "went off it for several days . . . and then started taking it again, going back on it would . . . produce some impairment." (Tr. 200). Dr. Method further testified that methadone could affect the "ability to focus," cause "divided attention," and "significantly" impair the driving of a user who did not regularly ingest the methadone. (Tr. 188, 189).

The jury found Roberts guilty of reckless homicide; it found him not guilty on the two operating while intoxicated counts. Subsequently, Roberts pleaded guilty to operating a motor vehicle while an habitual traffic offender.[3]

DECISION

1. Sufficiency

"In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and reasonable inferences favorable to the judgment and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Dunlap v. State, 761 N.E.2d 837, 839 (Ind. 2002).

[3] Roberts also admitted to the allegation that he had violated probation by being arrested and charged in this case.

Pursuant to statute, "[a] person who recklessly kills another human being commits reckless homicide, a class C felony." Ind. Code § 35-42-1-5. "A person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." I.C. § 35-41-2-2(c). To sustain a conviction of reckless homicide, there must be evidence of probative value supporting each of three elements: (1) causation; (2) that the act resulting in the homicide was voluntary; and (3) that the defendant's conduct "was reckless and not merely negligent." Gibbs v. State, 677 N.E.2d 1106, 1108-9 (Ind. Ct. App. 1997), trans. denied (quoting Taylor v. State, 457 N.E.2d 594, 597 n.6 (Ind. Ct. App. 1983)).

Roberts asserts that because the jury's verdicts indicate that "the State's extensive impairment argument" (operating while intoxicated) must have failed, the State's "total remaining argument" about recklessness was limited to the speed of the vehicle and the fact that it hit the curb. Roberts' Br. at 12. Arguing that "there must be more than mere speeding to escalate that act to a reckless disregard" in order to establish reckless homicide, Roberts contends that "the facts support the conclusion that Roberts did not commit the crime of reckless homicide, and his conviction must be reversed." Id. at 14, 15. We disagree.

Robert cites our observation in Whitaker v. State, 778 N.E.2d 423, 426 (Ind. Ct. App. 2002), trans. denied, that driving in excess of posted speed limits is an infraction under Indiana law. However, after reviewing various other reckless homicide cases, we first observed that "relatively slight deviations from the traffic code" did not "necessarily

support a reckless homicide conviction if someone is subsequently killed," but that a "gross deviation[] from the traffic code" could "under certain circumstances be such a substantial departure from acceptable standard of conduct" as to support a reckless homicide." Id. at 426. Further, we stated that "greatly excessive speeds, such as twenty or more miles per hour over the posted speed limit" might support a reckless homicide conviction.

In Whittaker, the defendant "was traveling approximately five miles per hour above the posted speed limit," but that was "the same speed as other motorists, making it clear that he was not substantially deviating from acceptable driving standards." Id. Further, the posted speed limit was fifty-five miles per hour. Thus, Whittaker's speed exceeded the posted speed by less than 10%.

Here, the jury heard the following evidence. In a posted thirty-five miles an hour speed zone, Roberts' speed was in a range "in excess of forty-five miles an hour" to "sixty" miles per hour. (Tr. 179, 104). Thus, jurors could reasonably conclude that Roberts was traveling at least ten and possibly as much as twenty-five miles per hour above the posted speed limit; or, as a percentage, that his speed exceeded the limit by 29% to 71%. Further, one expert testified that excessive speed makes it more difficult to control a vehicle, and another expert testified that methadone could affect one's driving ability. On a warm spring Saturday afternoon, Roberts drove at excessive speed in a residential and small business area in which pedestrians could be expected to be present. In addition, as he drove at an excessive speed through the area, Roberts was driving a borrowed vehicle – leading to a reasonable inference that he might have been unfamiliar

with its handling. Finally, Roberts was driving a borrowed car at excessive speed with methadone in his system. The foregoing allows reasonable jurors to conclude beyond a reasonable doubt that Roberts' driving killed Bryant; that he voluntarily drove at excessive speed in an area of Washington Street where pedestrians are likely to be present in a borrowed vehicle; and that he had methadone in his system—all of which could constitute reckless conduct in disregard for the safety of others. Therefore, sufficient evidence supports the conviction. See Gibbs, 677 N.E.2d at 1108-9.

2. Order to Pay Fee

Roberts also argues that the trial court abused its discretion when it ordered Roberts to pay a $100.00 public defender services fee without having first conducted a hearing as to Roberts' ability to pay that $100.00. We disagree.

According to the CCS, at a hearing on June 3, 2003, the trial court found Roberts to be indigent and appointed counsel for him. Roberts does not provide a transcript of this hearing in his Appendix on appeal. At sentencing on April 13, 2004, the trial court discussed the facts that it considered, imposed sentence, noted Roberts' credit time, and found Roberts "indigent as to costs and fines." (Tr. 328). The trial court then appointed counsel for Roberts "to pursue an appeal." (Tr. 329). There was no mention made at sentencing as to the payment of a fee for the public defender, and Roberts does not direct us to the record in that regard. However, we find in the CCS an entry for the date of sentencing that states, "$100.00 SUPP PUB DEF SERVICE FEE assessed." (App. 20).

Sentencing rests within the sound discretion of the trial court, and we review its sentencing decision "only for an abuse of discretion." Jones v. State, 812 N.E.2d 820,

826 (Ind. Ct. App. 2004). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances. Id.

Indiana statute provides that "[p]rior to the completion of the initial hearing," the trial court "shall determine whether a person who requests assigned counsel is indigent," and if it so finds, "shall assign counsel to the person." I.C. § 35-33-7-6(a). The statute further provides that in the case of a felony action, if the trial court "finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay . . . a fee of one hundred dollars ($100.00)." I.C. § 35-33-7-6(c). May v. State, 810 N.E.2d 741, 745 (Ind. Ct. App. 2004), declared that notwithstanding the fact that the statute appeared to contemplate that trial courts would "order the defendant to pay the $100 fee at the initial hearing," it did not "prohibit trial courts from imposing it at other stages of the proceedings." In any event, May held that this statute required the trial court to make "a finding of [the defendant]'s ability to pay the costs of representation." Id. at 746.

Roberts reminds us that May "remanded to the trial court with instructions to reverse the assessment" of a public defender fee because "the trial court failed to hold the hearing required by statute." Roberts' Br. at 16. However, in May, the defendant challenged the trial court's order that he "pay $750 into the supplemental public defender services fund." 810 N.E.2d at 745. After first noting the above statute authorizing assessment of a $100 fee in a felony action, May cited two other statutes, I.C. §§ 33-9-11.5-6 and 33-19-2-3, that "allow trial court to impose representation costs against a defendant in excess of $100." Id. May then concluded that the trial court therein had

failed "to follow the steps that must be taken" pursuant to the three statutes "before imposing a public defender services fee." Id. at 746. Because the May court relied on all three statutes in addressing a challenge to an order to pay $750 for public defender services, and because May declined to follow Turner v. State, 755 N.E.2d 194 (Ind. Ct. App. 2001), trans. denied, we do not find it dispositive here.

As the State notes, it is undisputed that the trial court did find at the initial hearing that Roberts was indigent, and it did appoint representation for him on that basis. In Turner, we held that these facts allowed an assessment of a public defender reimbursement fee of $100 as authorized by I.C. 35-33-7-6(c) without a separate hearing therefor. 755 N.E.2d at 200-01. Consistent with Turner, we do not find that the trial court abused its discretion when it ordered Roberts to pay a fee of $100 for public defender services.

We affirm.

KIRSCH, C.J., and MATHIAS, J., concur.